NO. 48256-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LIBERTY MUTUAL,

Appellant,

v.

LISA K. JOHNSON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

A trial court cannot give the jury the role to interpret the law, nor may it change the burden of proof. Although under the remedial Industrial Insurance Act judges may apply liberal construction to construe ambiguous statutes, this does not apply to questions of fact. And our Supreme Court reverses trial courts who offer a "liberal construction" instruction (like the one here) because a jury may not decide the law. *See Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945).

Instruction No. 14 invoked liberal construction and invited the jury to give "the benefit of the doubt" to Lisa Johnson if the jury believed that "reasonable minds may differ as to the meaning of the law [it was] provided[.]"[1] The instruction confused the jury by telling it the Industrial Insurance Act's "beneficial purpose should be liberally construed in order to achieve its goal of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."[2] The instruction shifted the burden of proof from appealing party Johnson to Liberty Mutual contrary to RCW 51.52.115. Because such a shift prejudiced Liberty Mutual, the Court should remand for a new trial.

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[1] Instruction No. 14 at CP 559.
[2] *Id.*

II. ISSUE ADDRESSED BY THE DEPARTMENT

A trial court does not instruct juries on legal questions or allow the jury to construe facts liberally. Here, the trial court instructed the jury to "liberally construe[]" the Industrial Insurance Act to fulfill its beneficial purpose and allowed the jury to give "the benefit of the doubt" to Johnson if the jury believed that "reasonable minds may differ as to the meaning of the law [it was] provided."[3] Was this prejudicial error in a case with closely contested medical evidence?

III. STATEMENT OF THE CASE

A. The Department Allowed Johnson's Occupational Disease Claim, but Denied an Alleged Neurogenic Thoracic Outlet Syndrome

Lisa Johnson filed an occupational disease claim with the Department of Labor & Industries alleging right arm and hand conditions resulted from her work as a claim specialist at Liberty Mutual. CP 8. She works primarily from home using a computer and phone with a headset. CP 90, 108-09. Johnson's physicians diagnosed an elbow condition, lateral epicondylitis, and she received treatment, including surgery. CP 105-07. The Department allowed the claim in June 2010 and benefits were paid. CP 75-76.

[3] Instruction No. 14 at CP 559.

After her surgical treatment for epicondylitis, she continued to complain of pain and numbness in her hand and arm. CP 93-94. She was referred to Dr. Kaj Johansen, who diagnosed a condition known as neurogenic thoracic outlet syndrome. CP 195-96. Irritation of the nerves in the thoracic area causes this rare condition. CP 393-94.

Johnson received multiple tests and examinations about this unusual diagnosis, including MRI studies, x-ray films, and electromyogram diagnostic testing. CP 195-96. No objective test confirmed the presence of neurogenic thoracic outlet syndrome and several specialists concluded that she did not have it. CP 196, 256-60, 297, 356-57, 398-407. Nonetheless, Dr. Johansen performed two separate thoracic outlet decompression surgeries. CP 61. The surgeries did not resolve the symptoms. CP 8.

The Department did not accept neurogenic thoracic outlet syndrome as occupationally related and after receiving medical confirmation that her elbow conditions had reached maximum medical improvement, the Department closed the claim in July 2013. BR 2; CP 69. Johnson appealed the decision to the Board of Industrial Insurance Appeals. CP 76.

B. The Board Concluded That Johnson Did Not Develop Neurogenic Thoracic Outlet Syndrome Related to Her Occupational Disease

At the Board, Dr. Johansen testified that he diagnosed Johnson with neurogenic thoracic outlet syndrome based on five criteria he has developed:

- his assessment that Johnson's occupation involved job duties that required a substantial out-front or overhead posture of the arms;
- Johnson's reported pain during a series of limb tension tests—namely, holding her arms out in front for a period of time;
- Johnson's reported symptoms did not improve over time;
- satisfactory exclusion of other potential diagnoses—her surgery for epicondylitis did not resolve the issue; and
- Johnson's response to a scalene nerve block—he opined a 50 percent improvement in symptoms when he used an injection to temporarily anesthetize the roots of the brachial plexus in her neck between the scalene muscles. CP 146-56.

Based on these criteria, which four other doctors contest, Dr. Johansen performed the two surgeries. CP 69.

Liberty Mutual called neurologist Lewis Almaraz, MD, who examined her in August 2009. CP 9-10. Dr. Almaraz's examination revealed normal range of motion, normal reflexes, and no atrophy. He did find a positive Tinel's sign, which is indicative of symptoms in the nerves that pass through the elbow and carpal tunnel of the wrist, but it is not indicative of thoracic outlet syndrome. CP 247. He diagnosed right lateral epicondylitis, but ruled out neurogenic thoracic outlet syndrome. CP 250, 256-60. He noted that it was "extremely rare" and he had only seen one

patient with such symptoms in his 30 years of practice as a neurologist. CP 252. He also concluded that her work duties could not have caused the condition because they would not "disturb the brachial plexus and cause the pathology" described. CP 256.

Vascular surgeon Daniel Neuzil, MD, examined her in July 2012. CP 10. During his examination, he saw no signs or symptoms associated with neurogenic thoracic outlet syndrome. CP 292. The electromyogram studies—studies that test nerve conduction—revealed no neurologic dysfunction. CP 296. Dr. Neuzil concluded that she had no condition that required the surgeries that Dr. Johansen performed. CP 296-97.

Orthopedic surgeon James Harris, MD, examined Johnson in September 2010. Dr. Harris noted that the nerve conduction studies did not reveal thoracic outlet syndrome. CP 335. The examination was normal except for a positive Tinel's sign. CP 337. He concluded that the history and objective examination do not support a diagnosis of neurogenic thoracic outlet syndrome. CP 356.

Vascular surgeon Richard Kremer, MD, examined Johnson in April 2012. After examining her and reviewing medical records, Dr. Kremer found no indication of neurogenic thoracic outlet syndrome and did not believe that her occupation could contribute to such a condition. CP 385, 398-407.

The testimony of Drs. Almaraz, Neuzil, Harris, and Kremer persuaded the industrial appeals judge that "Ms. Johnson probably does not suffer from neurogenic thoracic outlet syndrome related to her work." CP 13. The industrial appeals judge found the doctors' testimony more persuasive than Dr. Johansen's because he "failed to reconcile Ms. Johnson's continued complaints, or her lack of atrophy or [nerve conduction] findings." CP 8. Based on these findings, the industrial appeals judge issued a proposed order that affirmed claim closure because her "conditions proximately caused by her occupational disease were fixed and stable and did not need proper and necessary treatment[.]" CP 14. Johnson petitioned the Board for review, but the Board adopted the proposed decision as its decision. CP 17, 30.

Johnson appealed to superior court. CP 1-2.

C. At Superior Court, the Jury Reversed the Board Findings After the Judge Instructed Them About "Liberal Construction"

The superior court reversed the Board order based on a jury verdict that concluded the Board erred "when it found that plaintiff's work activities with defendant did not proximately cause or aggravate thoracic outlet syndrome[.]" CP 634.

Over Liberty Mutual's objection, the trial court instructed the jury about "liberal construction." CP 559; RP 184. The instruction told the jury

that "[they] should keep in mind that the Industrial Insurance Act is remedial in nature and its beneficial purpose should be liberally construed in order to achieve its goal of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." CP 559. The instruction also told them that liberal construction "does not require you to view the facts in a light more favorable to the injured worker in this case, *but where reasonable minds may differ as to the meaning of the law you have been provided, the benefit of the doubt belongs to the injured worker.*" CP 559 (emphasis added).

The worker's closing statement to the jury relied on this instruction, admonishing the jury that "[a]s you are deliberating, if there's some discussion about how these instructions should be interpreted, how the law should be interpreted, the benefit of the doubt belongs to the worker." RP 199-200. In the parting words in closing, Johnson emphasized that "the law says the benefit of the doubt belongs to the injured worker." RP 199.

IV. STANDARD OF REVIEW

The court applies the ordinary civil standard of review to the trial court's decision in a workers' compensation appeal. RCW 51.52.140; *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d

355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board. *See Rogers*, 151 Wn. App. at 179-81.[4]

The court reviews jury instructions de novo, and the court reverses a trial court if it erroneously instructed the jury about the applicable law where the error prejudices a party. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008). "Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial." *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002) (citation omitted). The court looks to all instructions to determine whether an instruction could have confused or misled the jury. *See Intalco Aluminum Co. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992).

V. ARGUMENT

A. The Trial Court Erred by Instructing the Jury to Construe the Law—a Task Solely for the Trial Court

The trial court erred by offering a "liberal construction" jury instruction. In drafting an instruction, a trial court first resolves any ambiguous statutes using liberal construction and then instructs the jury about the applicable law. The jury has no role in determining the law. The trial court's error materially affected the trial's outcome. *See* Part V.C.

[4] The Administrative Procedures Act does not apply. *Rogers*, 151 Wn. App. at 180.

infra. While liberal construction applies to help a court interpret an ambiguous statute, it does not apply to factual determinations in a workers' compensation appeal. *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012); *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *see also Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993).[5]

Jury instructions are sufficient if they allow the parties to argue their theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to apply. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995); *see also Intalco*, 66 Wn. App. at 663. Here the jury instructions misled the jury and did not correctly state the law for it to apply.

The "liberal construction" jury instruction offered here provided:

> It is your duty to apply the law you have been provided to the facts of this case. You should keep in mind that the Industrial Insurance Act is remedial in nature and its beneficial purpose should be liberally construed in order to achieve its goal of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. This does not require you to view the facts in a light more favorable to the injured worker in this case, but where reasonable minds may differ

[5] The court does not consider liberal construction alone when it construes an ambiguous workers' compensation statute. Rather a court may also look to other statutory tools of construction. *See, e.g.*, *Gorre v. City of Tacoma*, 184 Wn.2d 30, 42-43, 357 P.3d 625 (2015) (applying legislative history to a workers' compensation statute to resolve ambiguity). Under the logic of instructing the jury about liberal construction, the trial court would have to offer all the tools of construction to the jury. This makes no sense.

> as to the meaning of the law you have been provided, the benefit of the doubt belongs to the injured worker.

CP 559.

In *Hastings*, the Supreme Court reversed the trial court for instructing the jury about liberal construction:

> You are instructed that the Workmen's Compensation Act of the State of Washington *should be liberally applied* in favor of its beneficiaries, the injured workmen. It is a humane law and founded on sound public policy and is the result of lawful, painstaking and humane considerations, and its beneficent provisions *should not be limited or curtailed by narrow construction.*

24 Wn.2d at 12 (emphases added). The *Hastings* Court held that this instruction was "prejudicially erroneous" because the court, not the jury, construes statutes. *Id.* at 12-13. The law limits the jury to deciding questions of fact, not law:

> The matter of liberal or narrow construction does not apply to matters of fact, but is limited to questions of law. The court, in its instructions to the jury, is required to give a liberal interpretation of the workmen's compensation act, but the jury is confined to a determination of the facts of the case from the evidence presented, in accordance with the court's instructions as to the law.

Id. at 13. Accordingly, the *Hastings* Court held that giving the instruction necessitated reversal because "the jury was directed to *apply* the act 'liberally' and was cautioned against a narrow construction thereof." *Id.* at

13 (alteration in original). Such an instruction improperly invests the jury "with a power that only the court should exercise." *Id.* at 13.

Johnson's instruction improperly instructed the jury to construe the act "liberally," contrary to the *Hastings* Court's admonishment that statutory construction falls within the court's province. *See* CP 559. An instruction that instructs that the Industrial Insurance Act's "beneficial purpose should be liberally construed in order to achieve its goal of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker" suffers from the same defect as the *Hastings* instruction and the trial court erred by offering it.

B. The Trial Court Erred by Shifting the Burden of Proof to Liberty Mutual When Johnson Is the Appealing Party

Johnson's proposed instruction not only commits error by instructing the jury to construe the law, but it goes one step further. It instructed the jury that "where reasonable minds may differ as to the meaning of the law you have been provided, *the benefit of the doubt belongs to the injured worker*." CP 559 (emphasis added). This proscription when read with the previous clause—that "[liberal construction] does not require you to view the facts in a light more favorable to the injured worker in this case"—tells the jury it *could* "view

the facts in a light more favorable to the injured worker" rather than hold the worker to her burden of proof. *See* CP 559 (emphasis added). This incorrectly shifted the burden away from the appealing party, here Johnson, to Liberty Mutual. But RCW 51.52.115 places the burden on the appealing party: "The findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." *See* App. Br. 21-22. As "the party attacking" the Board's findings Johnson had the burden to prove the decision was wrong. *See* RCW 51.52.115. The instruction turned this burden on its head. Instead, the trial court told the jury that "the benefit of the doubt" belongs to the worker if "reasonable minds can differ" when applying the law to facts before it. *See id.*

The Court does not read Instruction No. 14 in isolation. *See Intalco*, 66 Wn. App. at 663. The trial court instructed that the Board's findings are "presumed correct" and that the "burden of proof is on the Plaintiff to establish by a preponderance of the evidence that the decision is incorrect." CP 551. But when read with Instruction No. 14, the jury would infer that if all things are equal, then the burden of proof shifts to Liberty Mutual to show the Board was correct rather than the opposite as RCW 51.52.115 requires. Read together, these instructions misled the jury.

C. The Court Should Reverse Because the Instruction Prejudiced Liberty Mutual by Shifting the Burden to It and Because *Hastings* Dictates Reversal

The trial court did not commit harmless error in Instruction No. 14 because Liberal Mutual could have prevailed if the trial court applied the proper standard. While Liberty Mutual must show prejudice to warrant reversal, "a clear misstatement of the law is presumed to be prejudicial." *Keller*, 146 Wn.2d at 249-50; *see also Saldivar v. Momah*, 145 Wn. App. 365, 401, 186 P.3d 1117 (2008) (error prejudicial if within reasonable probabilities it materially affects trial's outcome). And our Supreme Court has already held that instructing a jury as to how to construe the Industrial Insurance Act is reversible error. *See Hastings*, 24 Wn.2d at 13.

Applying the burden of proof provided by RCW 51.52.115 to the appealing party—here Johnson—rather than viewing "the facts in a light more favorable to the injured worker," a jury could conclude that Johnson did not meet her burden of proof.

Liberty Mutual presented compelling evidence that Johnson did not have neurogenic thoracic outlet syndrome and that the "conditions proximately caused by her occupational disease were fixed and stable and did not need proper and necessary treatment[.]" *See* CP 14. Drs. Almaraz, Neuzil, Harris, and Kremer all testified that Ms. Johnson does not suffer from neurogenic thoracic outlet syndrome related to her work. CP 256-60,

297, 356-57, 398-407. Dr. Almaraz indicated work activities could not cause this rare condition because they would not "disturb the brachial plexus and cause the pathology" described. CP 256. Dr. Neuzil testified that the thoracic outlet surgeries were not medically necessary and that Johnson needed no further treatment. *See* CP 297. Dr. Harris likewise ruled out neurogenic thoracic outlet syndrome because no objective evidence supported such a diagnosis. *See* CP 356-57. Finally, Dr. Kremer found no neurogenic thoracic outlet syndrome and did not believe that Johnsons's occupation could contribute to such a condition. CP 395-407. Only Dr. Johansen—who performed the two failed surgeries—made this rare diagnosis.

The Board was persuaded by the other doctors' testimony because Dr. Johansen "failed to reconcile Ms. Johnson's continued complaints, or her lack of atrophy or [nerve conduction] findings." CP 8. It found that Johnson did not suffer from neurogenic thoracic outlet syndrome proximately caused or aggravated by her occupational disease. CP 9 (Finding of Fact No. 3). And the Board findings are presumed correct unless the worker shows otherwise. *See* RCW 51.52.115.

Given that the trial court committed prejudicial error by instructing the jury with the incorrect burden of proof and by telling it to construe the law, this case must be remanded to the trial court to apply the correct

burden of proof. *See Hastings*, 24 Wn.2d at 13; *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982) (remanding because trial court misapplied Washington law regarding sufficiency of the evidence and burden of proof); *Nissen v. Obde*, 55 Wn.2d 527, 529-30, 348 P.2d 421 (1960) (remanding to allow the trial court to review the evidence under the correct burden of proof). On remand, the trial court should not offer a "liberal construction" instruction.

VI. CONCLUSION

Under *Hastings*, the trial court committed reversible error by instructing the jury about "liberal construction" because the jury does not determine the law. The instruction compounded the error by shifting the burden of proof. The Department asks this Court to remand to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 15th day of July, 2016.

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